

## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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International Chemical Workers Union Council  
UFCW

Complainant

v.

Hillsborough County Nursing Home

Respondent

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Case No. M-0764-6

Decision No. 2001-034

### APPEARANCES

Representing the International Chemical Workers Union Council/UFCW (Petitioner)

John B. Mendolusky, I. U. Representative

Representing the Hillsborough County Nursing Home (Respondent)

Carolyn M. Kirby, Esquire, Assistant County Attorney

Also appearing as Witness: John B. Mendolusky, I. U. Representative  
Bruce Morehead, Nursing Home Administrator

### BACKGROUND

The International Chemical Workers Union Council/UFCW (hereinafter referred to as the "Union") filed a petition to modify the composition of an existing bargaining unit of other so-called "middle managers" on January 22, 2000, seeking to add position of Social Services Director. The Hillsborough County Nursing Home (hereinafter referred to as the "County") filed its exception on February 7, 2001 objecting to the modification petition and seeking to exclude the Social Service Director position based upon the a lack of a "community of interest" with the existing unit members and the supervisory

responsibilities attendant to that position. The County requests that the petition be denied.

On January 23, 2001 the Public Employee Labor Relations Board (hereinafter referred to as the "PELRB") acknowledged receipt of the petition and issued its notice to both parties that exceptions must be filed, i.e. received, in its office no later than February 6, 2001. As indicated above, the County did not file its exception until the day following. The Union hand delivered a Motion for Summary Judgement on February 7, 2001 prior to the PELRB's receipt of the County's response. The County filed its objection to the dispositive motion citing that the delay was caused by a snowfall of between eighteen (18) and thirty (30) inches the previous day that resulted in the closure of its office.

An evidentiary hearing was scheduled in due course and conducted on April 12, 2001. At the outset, the Hearing Officer denied the Union's Motion for Summary Judgement. The Hearing Officer then inquired as to any other outstanding issues between the parties and with none presented, he proceeded with the hearing on the merits. At the conclusion of the evidentiary hearing, the record was left open until April 22, 2001 to allow the parties to submit their respective legal memoranda. At the close of that day and having received memorandum from each party, the record was closed.

#### FINDINGS OF FACT

1. Hillsborough County employs personnel in the operation of its public nursing home and thereby qualifies as a "public employer" within the meaning of RSA 273-A:1, X.
2. The International Chemical Workers Council/UCFW is the duly elected and certified exclusive bargaining representative of a bargaining unit comprised of certain positions employed at the Hillsborough County Nursing Home consisting of eleven job classifications. (See PELRB Amended Certification dated December 13, 2000, an object of judicial notice).
3. The Social Services Director (SDD), also referred to in testimony as the "Director of Social Services", is the current title for a position that has existed within the personnel structure at the County Nursing Home for an indefinite time prior to the initial certification of the existing unit.
4. The position of Clinical Behavior Therapist (CBT) was previously certified within the existing bargaining unit. Since the time of certification, the position's duties were modified and the work week was reduced from 40 hours to 30 hours weekly. The incumbent resigned as a consequence of the resulting decrease in wages and disqualification from pension benefits that require a minimum of 35 hours weekly. The position remains vacant.

5. Bruce Moorehead is the Administrator of the Nursing Home and has been for approximately twenty-two months. He testified that he made the decision to reduce staff when he downsized the Enhanced Living Unit (ELU) from 46 beds to 24 beds and he eliminated the Hospice Program. A result of his decisions was to reduce the responsibilities and duties of the CBT and the hours assigned to the position's work week from 40 hours to 30 hours since the CBT had had primary responsibility for the patients residing in the Enhanced Living Unit. However, the CBT's responsibilities were not exclusive to the ELU.
6. At approximately the same time as the modifications to the CBT position were implemented, the responsibilities of the SSD were modified to assume some of those responsibilities previously fulfilled by the CBT.
7. Mr. Moorehead also testified that following the reorganization approximately ten hours of the SSD were allocated to duties previously performed by the CBT in the, now, smaller ELU. The elimination of the Hospice Unit, for which she had previous responsibilities, also allowed this reassignment of duties.
8. There has been no attempt by management to fill the CBT position although it does appear in the County's FY 2001 budget as a line item and is funded for FY 2002 at the level of 30 hours weekly. Mr. Moorehead testified that he has no present plans to fill the position. Under cross-examination he stated that he did not see any present need for a CBT under the parameters of the present job description, but added that "it is subject to change."
9. The job posting for the position of Social Service Director, dated December 6, 2000 includes a reference that the SSD will be directly responsible for the "supervision of three full time social workers". It is notable that these three employees are not members of the existing bargaining group to which the Union seeks to add the position of SSD. (Union Exhibit #1).
10. The DSS job description expresses that this position reports to the Assistant Administrator/Director of Nursing Services. Its stated administrative responsibilities include the review and evaluation of employee performance, assistance in the discipline of department personnel, the determination of departmental staffing, working hours and assignments, the setting of standards for departmental personnel and supervising the CBT position among other duties. (County Exhibit #1). The supervision of the CBT is a responsibility that was added in December of 2000. (Compare with County Exhibit #3). Mr. Moorehead's testimony supported the proposition that the SSD, in fact, does perform the responsibilities expressed in the job description. However, under cross-examination, he conceded that these applied only to social service workers who were members of a separate bargaining unit without a CBT in place.
11. The job position for the Clinical Behavior Therapist expresses that this position reports to the Director of Social Services (now the Social Service Director). (County

Exhibit #2). Contrary testimony was offered by the Union that the CBT, in fact, reported to the Assistant Director of Nursing and not the SSD.

12. Mr. Mendolusky testified on behalf of the Union that under the present organizational scheme within the Nursing Home, if there was a CBT in place then that person would be required to report to the SSD.
13. Mr. Moorehead testified that the SSD performs some duties that were formerly assigned to the CBT position and she would continue to perform them even if a CBT was hired for a thirty hour week. Further, he stated that some of the CBT duties were now being assumed by three social workers.
14. The Benefit package afforded to the SSD differs from the present package provided to members of the existing unit as to the percentage contribution towards the insurance premium co-payment and as to the use, accumulation and reimbursement of sick leave. Other benefits are presently administered to both the SSD and members of the existing unit under a single set of personnel rules as no collective bargaining agreement has yet been approved between the County and the Union.
15. Mr. Moorehead also testified that there are both exempt and non-exempt FLSA employees within the existing unit.

#### DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) is the administrative agency charged with the determination of the composition of public employee collective bargaining units. RSA-A:8. The composition of each bargaining unit is evaluated on its own circumstances on a case by case basis. Appeal of Town of Newport, 140 N. H. 343, 352 (1995). The PELRB's determination of the existence or non-existence of a "community of interest" among a group of job positions is fact based. In addition to the statutory criteria by which to assess this interest the PELRB has promulgated additional considerations as part of its administrative rules. Pub 302.02. These include the existence a common geographic location for the proposed unit, common work rules and personnel practices, a common salary structure and fringe benefit structures, and whether or not there is a self-felt community of interest among those to be included in the unit. These are not exclusive criteria, but are promulgated to give notice to parties of the nature of the working relationship that is being evaluated. The ultimate question is whether there is a sufficient community of interest among the bargaining unit positions so that it is reasonable for those included to negotiate together. *Id.* Citing Appeal of the University System of New Hampshire, 120 N. H. 853, 855 (1980).

While the authority cited here resulted from the court's review of the initial formation of bargaining units, it is no less appropriate for application to this modification of an existing unit. Since there has been no collective bargaining agreement established as of the date of the petition, the petition survives the threshold test embodied in Pub

302.05 (b)(2) which prohibits an attempt to modify an existing bargaining agreement under certain conditions while a CBA is in force. These parties did not have a CBA in force at the time of the Union's petition.

This modification petition requests the PELRB to allow the position of Social Service Director to be added to a bargaining unit previously certified and subsequently modified under PELRB procedures. (See original PELRB Decision No. 1999-079). The County's exception brings into question the issues of community interest and supervisory capacity as are common to unit composition cases. Those issues, in turn, cause us to refer to RSA 273-A:8, I. The relevant provision of that statute provides that "Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." The PELRB is vested with the discretion to delineate which employees are "supervisory" Appeal of City of Concord 123 N. H. 256 (1983).

Both parties agree that at the time that this unit was initially certified, both the position of Director of Social Services, now referred to as Social Service Director, and that of Clinical Behavior Therapist were in existence. The CBT was included within the certified bargaining unit; the SSD position had not then been requested by the exclusive bargaining representative. Over the relatively short period of time since the original certification, some things have changed in the operation of the Nursing Home. Two changes are relevant to this decision. First, the position of Clinical Behavior Therapist has had its hours reduced from forty (40) to thirty (30) weekly as a result of reorganization of the residential care being provided within the County's Nursing Home. (Finding of Fact #4). Specifically, the so-called "Enhanced Living Unit" has been substantially reduced in size and the Hospice Program has been eliminated. (Finding of Fact #5). The CBT had significant responsibilities for a census of patients that no longer exists. Second, The resulting reduction in pay and disqualification from pension benefits contributed to the resignation of the person employed in that position. (Finding of Fact #4). Further, while the position is maintained in the Nursing Home budget through its fiscal year ending in the year 2002, the testimony of Mr. Moorehead suggests that there is no realistic intention of filling the CBT position in the near-term, if at all. (Finding of Fact #8).

Without the necessity for consideration at this time of an actual supervisory relationship between these two positions, the evaluation of the working relationship of the SSD for inclusion with other positions presently within the bargaining unit is made more simple. The SSD works in the same location as the others. The SSD performs some of the same duties as previously performed by the CBT that was previously included within the bargaining unit. (Findings of Fact #6 & #13). The existing unit contains both exempt and non-exempt employees for purposes of the Fair Labor Standards Act. (Finding of Fact #15). With the exception of the application of a sick leave provision and a change in the amount of premium contribution for health insurance coverage paid by the SSD, she and the existing members work under a common set of personnel regulations and work rules. The SSD and the existing members all work in pursuit of a common mission of advancing the care and treatment provided to the patient population

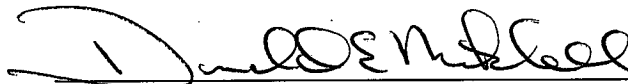
which resides within the health facility. A sufficient community of interest is found to exist between the SSD position and those collectively united within the existing bargaining unit.

Until such time as there is a viable CBT or other position for the Social Service Director to supervise to the extent required by the application of RSA 273-A:8, II (c), who is also a member of the existing bargaining unit, no reason exists to deny the extension to the SSD of those rights conferred upon public employees by the legislature through its enactment of RSA 273-A.

The petition is granted. The Social Service Director position is hereby added to the existing bargaining unit and it shall be represented by the same exclusive bargaining representative for purposes of collective bargaining and the exercise of other rights as conferred by statute.

So ordered.

Signed this 22<sup>nd</sup> day of May, 2001

A handwritten signature in dark ink, appearing to read "Donald E. Mitchell", written over a horizontal line.

Donald E. Mitchell, Esq.  
Hearings Officer